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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 191

GERALDINE SNELL, *et al.*,

Appellants,

—v.—

GEORGE K. WYMAN, as Commissioner, New York State Department of Social Services; MITCHELL GINSBERG, as Commissioner of New York City Department of Social Services,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' MEMORANDUM IN REPLY TO SOLICITOR GENERAL'S BRIEF

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This memorandum is submitted on behalf of Appellants by permission of the Clerk of the Court in reply to the amicus curiae brief submitted by the Solicitor General on behalf of the United States.

The Issues Presented on Appeal

References in the Solicitor General's brief to the "small record" (p. 4) and the alleged failure of the appellants to present and develop certain issues before the court below

(pp. 8, 11, 12) constitute a gratuitous assertion by the government of what the issues should be and, by implication, an incorrect statement of the issues actually presented to this Court.

We are satisfied with the original presentation of these issues in our Jurisdictional Statement and will not repeat them here. Though we disagree with certain of Judge Frankel's characterizations of the appellants' case—the tone of which, incidentally, appears exaggerated in the light of Judge Kaufman's forceful dissent—we do not quarrel with the exposition in the majority and dissenting opinions of the facts and plaintiffs' arguments in the court below, with this possible exception:

The majority opinion in the Southern District states broadly "it is provided by regulation, and unequivocally represented to this court, that no such recovery may be sought from wages or salaries or from property acquired with such earnings" (J. S. App. 25; 281 F. Supp. at 860).

The dissenting opinion, though it holds that the burden of raising the earned income issue (presumably at the time of initial assignment of property) should not be placed on recipients, seems to assume, incorrectly, that the earned income exemption applies to these assets owned at the time of initial application as well as to after-acquired property (J. S. App. 49; 281 F. Supp. at 871). There has been no dispute, however, between the parties, and the regulation itself confirms, that the "employment income" exemption applies only to "resources acquired subsequent to a period of public assistance" (Exhibit attached). *Policies Governing the Administration of Public Assistance,* City of New York, Department of Social Services (reissued May, 1967), Sec. 189.

Consequently, whether or not the New York City Department violated its own rule in respect to Helen Marley's insurance premiums (J. S. App. 25; 281 F. Supp. at 860, n. 12, 872) is a matter for administrative determination and is not properly before this Court. What appellants *do* contend, however, *inter alia,* is that the uncontroverted and unqualified refusal of New York to grant an exemption, at the time of assignment, to that portion of assets attributable to earned income, does conflict with the rehabilitation policies of the Social Security Act.

We do not concur in Judge Frankel's refusal to regard this as a class suit which has the possible effect of unduly narrowing the scope of the issues presented. But even if we are wrong on this score it is absurd to suppose that appellants Geraldine Snell and Helen Marley, both of whom the record shows were employed shortly before the time of assignment of their respective assets, did not purchase the cooperative apartment (Snell) or life policy (Marley) at least in part with employment income.

The Legislative History

We also disagree with the government's arguments that derive from the legislative history of the federal recovery provisions. 42 U. S. C. 602(b)(2)(B), 1353(b)(2)(B). It is true (S. G. br. 6) that the 1939 Amendments added "mistakes" to "fraud" situations justifying recoveries but, clearly, Congress still intended to restrict recoveries to instances when, because of client cheating or mistake, the assistance payment violated the basic statutory purpose of aiding only the needy.

There is also no evidence in the legislative history that at the time of enacting the more lenient provisions of Medi-

cal Assistance to the Aged (1960) or Medicaid (1965), Congress debated whether to insert similar prohibitions against recoveries in the cash assistance titles. These statutes also were enacted after the "new emphasis on rehabilitative services began with the Kennedy Administration," an event relied upon heavily by this Court in *King* v. *Smith,* 392 U. S. 309, 325, n. 22. But even if we assume that Congress deliberately chose to exclude cash assistance recipients from the non-payment exemption, it does not necessarily follow, in the light of the "AFDC freeze" and other punitive provisions of the 1967 amendments, that Congress did so on reasonable and equitable grounds.

On the other hand, appellants have argued (J. S. 8) and the Solicitor General has not denied, that portions of the 1935 legislature history, when read together with related passages in the Old Age, Survivors' and Disability Insurance title, strongly indicate that in 1935 Congress intended to restrict recoveries to fraud situations. See, also, *City of Worcester* v. *Quinn,* 304 Mass. 276 (1939).

It also comes with poor grace for the Department of Health, Education and Welfare (HEW), to argue, through the Solicitor General (S. G. br. 7) that the validity of the New York and similar recovery provisions should be inferred from the fact that HEW had never disapproved the recovery provisions; Alabama's substitute father regulation, struck down by this Court as being in conflict with the Social Security Act, was neither approved nor disapproved by the federal agency. *King* v. *Smith,* 392 U. S. 309, 317, n. 11; see also, *Anderson* v. *Schaeffer,* —— F. Supp. —— (M. D. Georgia 1967) which involved a partially successful attack by *recipients* against Georgia's "employable mother" regulations.

The Statutory Conflict

The Solicitor General contends that the alleged conflict with the purposes of the Social Security Act is "inadequately developed on this record" (S. G. br. 8). This would be so if the government's brief expressed and attempted to meet all of appellants' contentions on this score. Instead the government greatly understates the appellants' case.

The government makes no reference to our principal contention that the recovery provisions frustrate the "self-support" and related purposes of the Social Security Act, 42 U. S. C. 601, 1351. Appellants do more than argue that the recovery provisions deter applicants or persuade recipients to leave the rolls (S. G. br. 9). Through expert witnesses we have also showed that the state, by insisting on repayment not only from those *able* to pay but from all those with property *available* for repayment (R. 674), vitiates the rehabilitation objectives of the federal statute by requiring destitution as a condition of assistance, by depressing the ambitions of those on the rolls, by discouraging low-income males from entering into marriage with AFDC mothers, and by facilitating the return to the relief rolls of former recipients who acquire assets (R. 631-2).

The government too narrowly interprets *King* v. *Smith* (S. G. br. 12) to mean that the Supremacy Clause argument must be based on a contravention of a specific federal standard contained in 42 U. S. C. 602, 1352. Nowhere in the majority opinion does the Court indicate that the validity of a state regulation has no relevance under the Supremacy Clause to the humane purposes of the Social Security Act recited in 42 U. S. C. 601, 1351.

This Court in *King* interpreted the term "parent" in 42 U. S. C. 606(a) to include only those persons with a legal duty to support, in order to meet "Alabama's second justification for its substitute father regulation" (at 327). Earlier in the majority opinion the Court said it was holding the regulation invalid "as inconsistent with *Subchapter IV* of the Social Security Act . . ." (at 312, n. 3) (emph. supplied) ". . . the regulation itself is unrelated to need" (at 320) ". . . insofar as this or any similar regulation is based on the State's asserted interests in discouraging illicit sexual behavior and illegitimacy it plainly conflicts with federal law and policy" (at 320).

In the instant case, Commissioner Ginsberg testified that the recovery provisions bear no relation to social work considerations but are designed to reimburse the public for the cost of assistance rendered (R. 500-501). This consideration, appellants contend, while otherwise valid, is unrelated to and conflicts with the rehabilitation purposes contained in 42 U. S. C. 601, 1351. The rehabilitation emphasis of the current statute, heavily relied upon by this Court in *King* (at 325, n. 22) also finds explicit expression in 42 U. S. C. 602(a)(12)(13) and 1352(a)(12) which mandate, respectively, service programs promoting child welfare, including a strengthened family life, and self-support or self-care for disabled recipients.

New York, as Judge Kaufman held (281 F. Supp. at 869), could feasibly devise a recovery scheme that would be compatible with the statutory purposes. Instead, New York requires the assignment even of minimal assets (R. 481). Disregarding the humane child welfare exception contained in 42 U. S. C. 602(7) relating to the "future identifiable needs of a dependent child" New York seeks repayment

even from estates otherwise payable to surviving minor children (R. 482-3, 592). The regulations do not permit administrators to "take into consideration the possibility that the recipient after exhausting his or her welfare allowance may return to the welfare rolls" (Ginsberg, R. 501; see also Wyman, R. 452). Contrary to the Solicitor General's assertion (S. G. br. 11) the record *does* show that New York, unlike California, does not permit homes to be designated as part of an allowable reserve (R. 23-25).

Most important, perhaps, whereas in *King* v. *Smith* needy Alabama children were denied assistance because of the immorality of their mothers, in New York likewise needy children will be denied categorical assistance if their mother refuses to assign to the department her property including resources the monetary value of which is not actually available to the family (Felder, R. 481; Ginsberg, R. 532; 18 N. Y. C. R. R. §§368.2, 369.2.

This unqualified requirement that all resources, tangible or not, be assigned as a prerequisite to assistance not only conflicts with the express rehabilitation purposes of the statute but also with HEW regulations prohibiting considerations, in determining need, of resources not actually available. *Need Requirements for State Assistance Plans*, 33 Fed. Reg. 10230 ff., Par. 3(C)(2)(iii).

Finally, the state recovery provisions that New York and HEW are now defending result in reimbursements to the state and federal government (J. S. App. n. 16; 281 F. S. n. 16; S. G. br. 7) that are grossly disproportionate to total outlays; the recovery provisions admittedly also have no effect on New York welfare benefits levels (Ginsberg, R. 500; Wyman, R. 449).

CONCLUSION

For the reasons stated above, the government's brief does not refute appellants' contention that a substantial question under the Constitution is presented in this case, and jurisdiction should be noted.

Respectfully submitted,

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December, 1968

Exhibit Attached to Appellants' Memorandum

POLICIES
GOVERNING THE ADMINISTRATION
OF
PUBLIC ASSISTANCE

[N. Y. City Emblem]

THE CITY OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES

MITCHELL I. GINSBERG
Commissioner

Reissued May, 1967

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a. *Insurance.* Insurance holdings may be retained with a cash value (as distinguished from face value) up to $250 for each adult and up to $100 for each child in the family group. Insurance holdings are not required to be converted from the endowment, 20-payment life or any other plan, to the whole-life plan. The total cash value of policies of all members of a family shall not exceed $500. When the cash value in insurance policies for all members of the family exceeds $500, such policies shall be adjusted to a total cash value of $500. The proceeds of the adjustments are applied to meet immediate needs which may include the payment of advance premiums

(see Section 180). Waiving of insurance adjustments requires special approval. Assignment of insurance is not required in short-term cases.

b. *Real Property Used as a Home.* A bond and mortgage is not required on real property classified and occupied as a "home". When principal payments are granted as part of the carrying charges, a bond and mortgage shall be required to protect the Department to the extent of principal payments made.

Section 189. Recovery of Assistance

a. *Resources Acquired Subsequent to a Period of Public Assistance.* The Department may bring action against a person discovered to have real or personal property, or against the estate or executors, administrators or successors in interest of a person who dies leaving real or personal property, if such person or anyone for whose support he is or was liable received assistance and care during the preceding ten years.

The Department is entitled to recover the cost of such assistance or care up to the value of such property.

However, when these assets do not exceed an amount of money required to meet the family's budget needs for one year (two years if the money was obtained as damages for personal injuries), recovery action shall be initiated only if special approval is received.

No referral shall be made if the newly acquired assets consist solely of income from employment.

b. *Resources Concealed During a Period of Public Assistance.* Both civil and criminal action may be taken against a person who concealed resources while accepting public assistance. Concealed resources include any item of real or personal property, income in cash or kind from any source, unacknowledged while receiving public assistance. All cases in which there is evidence of concealment of resources, whether active, pending, or closed, shall be referred immediately to the Bureau of Resources and Legal Services and shall be subject to recovery action when there is evidence that:

1. Income in cash or kind from any source has been misrepresented or concealed.